



July 29, 2015

The Honorable Lisa Murkowski
Chairman, Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Madam Chair:

The Department of Commerce (Department) opposes the hydropower provisions of Title III of S. ___, the Energy Policy Modernization Act of 2015, which would threaten the survival of threatened and endangered species and the economic viability of recreational and commercial fisheries. By centralizing decision-making at the Federal Energy Regulatory Commission (FERC), the proposed legislation would eliminate the Federal Power Act's (FPA) mandate to ensure a balance between hydropower industry and non-hydropower interests in the licensing process, and would subordinate federal and state agencies' independent authorities to protect natural resources in favor of the hydropower industry. In doing so, this proposed legislation would overturn checks and balances over the federal management of water resources and protections for natural resources that have been in place for decades.

The Department's National Oceanic and Atmospheric Administration (NOAA) ensures healthy fisheries and habitat for the benefit of all Americans. NOAA's role in the hydropower licensing process is an integral part of fulfilling this mission. The FPA grants the Secretary of Commerce (Secretary) the authority, delegated to NOAA, to provide for the safe, timely, and effective passage of migrating fish at hydropower dams licensed by FERC. In addition, under the Endangered Species Act (ESA), NOAA works to ensure that threatened and endangered species are not jeopardized and their critical habitats are not adversely modified or destroyed. Because project licenses are in effect for 30-50 years, the relicensing process is a critical opportunity to improve fish passage in a given location. NOAA's FPA and ESA authorities provide an established, transparent, and science-based way to ensure that hydropower relicensing incorporates measures to protect fish passage, which are necessary to recover threatened and endangered species and to rebuild and maintain economically important commercial and recreational fisheries.

The Department offers the following views in opposition to the hydropower provisions of Title III of the Energy Policy Modernization Act of 2015:

Section 3001(g)(1) would require NOAA, in carrying out its role in overseeing the use, design, construction and operation of fishway facilities, to show that its prescription has a “clear and direct nexus to the presence or operations of the project being licensed.” This provision would undermine the role of NOAA’s specialized biological expertise in determining the impacts of a hydropower project and need for mitigation of those impacts. Section 3001(g)(1) also would require NOAA to demonstrate specific project impacts on fish population levels. However, ecosystems are complex, and impacts are often interrelated and cumulative. This would require NOAA to isolate the impacts of blocked passage from other compounding factors in complex biological systems, and sets an inappropriately difficult threshold, requiring time-consuming and expensive modeling. This is especially concerning, given the limits on gathering critical biological information that section 3001(i) of this bill would impose. Additionally, although NOAA rarely exercises its authority to place conditions on hydropower projects on federal lands, such as national marine sanctuaries, pursuant to section 4(e) of the FPA, the concerns expressed above apply equally to the proposed amendments to section 4(e) found at section 3001(c) of the proposed legislation.

Section 3001(i), which proposes to add a section 34 to the FPA, would require FERC to use existing studies and data in licensing proceedings to the maximum extent practicable, creating a standard that could effectively prohibit new study requests. NOAA requests studies that are designed to inform current determinations of species protection measures for a specific project under the agency’s FPA and ESA mandates. Existing project-specific data could be up to 30-50 years old, if collected during a previous licensing proceeding; with rapidly changing environmental conditions, outdated information would lead to poorly tailored licensing orders. And relying on data from other hydropower projects would likely be insufficient to assess project-specific impacts and would require NOAA to be more conservative in determining protection measures due to insufficient data. Furthermore, with rapid climate change, a study that may appear duplicative of prior efforts might yield different results critical for efficiently tailoring a licensing order to shifting environmental conditions. Section 3001(i) also would require NOAA, to the maximum extent practicable, to prepare ESA Biological Opinions concurrent to the development of a fishway prescription when the details of the project design may not be mature enough to determine protection measures for ESA species.

Section 3001(i) also proposes to add a section 35 to the FPA, which would require NOAA to conduct an “equal consideration” analysis when filing any fishway prescription, even in the absence of an alternative prescription proposal from the licensee or other party to the proceeding. Under existing section 33 of the FPA, NOAA conducts an equal consideration analysis only if it

receives an alternative prescription, which serves as the basis for comparison. The requirement of an equal consideration analysis is meaningless in the absence of an alternative prescription, because if no alternative prescription is submitted, there is nothing to which to compare NOAA's prescription. Only when NOAA receives an alternative prescription can it then proceed to conduct a cost comparison of two different approaches for achieving the same degree of resource protection. Furthermore, NOAA often does not have ready access to applicable data to analyze the effects of an alternative fishway prescription on factors such as energy supply, distribution, cost and use, flood control, navigation, water supply, or air quality. NOAA's existing regulations implementing section 33 of the FPA require license parties (who are in possession of the best and most comprehensive data available on factors such as energy supply, distribution, cost and use, etc.) to provide this information to NOAA together with any proposed alternative prescription.

Proposed new FPA section 35, which would designate FERC as the lead agency responsible for coordinating all required federal authorizations related to the licensing or relicensing of a hydropower project, also requires federal agencies to "cooperate with the Commission." It is not clear whether this provision also requires NOAA to participate as a "cooperating agency" in the preparation of an environmental impact statement under the National Environmental Policy Act (NEPA). Under existing FERC policy interpreting its "ex parte" regulations (18 C.F.R. § 385.2201(e)), agencies that cooperate in the preparation of NEPA documents cannot also intervene in the FERC licensing proceeding (*See Arizona Public Service Company*, 94 FERC § 61,076 (2001)). This critical intervention authority allows NOAA to challenge FERC orders by requesting "rehearing" on issues of contention related to fish passage requirements and recommendations to protect, mitigate, and enhance fish and wildlife and their spawning grounds. Requiring NOAA to participate as a cooperating agency without simultaneously requiring FERC to amend its "ex parte" policy to allow cooperating agencies to intervene as a party to the proceeding would constrain NOAA's ability to advocate strongly for its fish passage and other protection, mitigation and enhancement measures under section 10(j) of the FPA.

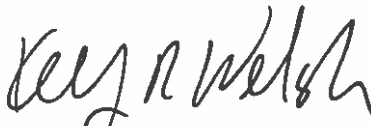
Section 3001(i) of the bill proposes to add a new FPA section 36 that would move from the Secretary to FERC the oversight and administration of trial-type hearings, proceedings that parties to a licensing proceeding may request in order to address disputed issues. Moving these proceedings to FERC will not save time or money in the licensing process. Trial-type hearings are rare; since 2005, NOAA has been involved in only three of these hearings, of which only one went through the process to completion. In contrast, during that same period, NOAA has been involved in more than twenty settlement agreements and issued fishway prescriptions that were

consistent with these settlements. Settlement agreements play an important role in advancing responsible hydropower by reducing litigation and relicensing delays.

In conclusion, NOAA has a history of working collaboratively with FERC to help improve the licensing process over the years (for example, working through the Interagency Task Force on Improving Hydroelectric Licensing Processes, developing guidelines for participating in the Alternative Licensing Process, and developing the Integrated Licensing Process), and stands ready to continue to do so going forward.

The Office of Management and Budget has advised that there is no objection to the transmittal of these views from the standpoint of the Administration's program. If you have any questions, please contact me or the Acting Assistant Secretary for Legislative and Intergovernmental Affairs, Jim Stowers, at (202) 482-3663.

Very truly yours,



Kelly R. Welsh

cc: The Honorable Maria Cantwell
Ranking Member